

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

DONNELL DEVON SMITH,

Petitioner,

v.

JUSTIN JONES, *et al.*,

Respondents.

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Case No. CIV-12-754-R

REPORT AND RECOMMENDATION

Petitioner, a prisoner appearing *pro se*, brings this action seeking a writ of habeas corpus under 28 U.S.C. § 2254. Pursuant to an order entered by United States District Judge David L. Russell, this matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C § 636(b)(1)(B). Petitioner has moved the Court to allow him to proceed *in forma pauperis* [Doc. Nos. 2, 7]. On July 10, 2012, the undersigned reviewed Petitioner's First Motion For Leave to Proceed *In Forma Pauperis*, and entered an order notifying Petitioner that his motion was deficient because it was not in proper form and was missing information and/or the signature of an authorized officer of the penal institution. Petitioner was directed to cure the deficiency on or before July 31, 2012. The Petitioner filed a second Motion for Leave to Proceed *In Forma Pauperis* [Doc. No. 7] on August 7, 2012. The undersigned reviewed the motion and entered an order [Doc. No. 8] finding that the financial information provided showed that Petitioner had sufficient financial resources to pay the

\$5.00 filing fee. The Petitioner was further cautioned that the undersigned would recommend that the action be dismissed without prejudice if the Petitioner failed to either pay the filing fee or provide additional documentation showing his inability to pay by August 28, 2012. As of this date, Petitioner has failed to respond to the Court's order. He has neither paid the full filing fee of \$5.00, nor submitted an amended motion for leave to proceed *in forma pauperis*.

Because the undersigned finds that Petitioner does not qualify for authorization to proceed without prepayment of the filing fee, it is recommended that Petitioner's motions to appear *in forma pauperis* [Doc. Nos. 2, 7] be denied and that he be ordered to prepay the full filing fee for this action to proceed. 28 U.S.C. § 1915(a)(1); *see Lister v. Department of the Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005) (magistrate judge should issue report and recommendation upon denial of motion to proceed in forma pauperis). It is further recommended that this action be dismissed without prejudice to refiling unless Petitioner pays the \$5.00 filing fee in full to the Clerk of the Court within twenty (20) days of any order adopting this Report and Recommendation.

RECOMMENDATION

It is therefore recommended that Petitioner's motions to appear *in forma pauperis* [Doc. Nos. 2, 7] be denied, and it is further recommended that this action be dismissed without prejudice to refiling unless Petitioner pays the \$5.00 filing fee in full to the Clerk of the Court within twenty (20) days of any order adopting this Report and Recommendation. Petitioner is advised of his right to file an objection to this Report and

recommendation with the Clerk of this Court by December 11, 2012, in accordance with 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72. Petitioner is further advised that failure to timely object to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *Moore v. United States*, 950 F. 2d 656 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the Magistrate Judge in the captioned matter.

ENTERED on November 21, 2012.



SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE